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JAMES H. McKENNEY,
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No. 16 Original.

Supreme Court of the United States.

IN THE MATTER

OF

THE PETITION OF GERTRUDE GLASER, AS ADMINISTRATRIX, FOR A WRIT OF MANDAMUS TO THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF.

ALVIN CUSHING CASS,
Counsel for Respondent.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

IN THE MATTER

OF

The Petition of GERTRUDE GLASER, as Administratrix, praying for a writ of mandamus to the Judges of the United States Circuit Court for the Eastern District of New York.

RESPONDENT'S BRIEF.

As indicated in the respondent's answer, he urges the following grounds in opposition to this application:

1. The summons as served, was neither issued, signed, nor sealed by the Clerk, and it was void.

2. The copy served upon the defendant, purporting to be in all respects a copy of a proper summons and served by a United Stated Marshal, the defendant, a carpenter, was not negligent in having been deceived by the forgery (unintentional as it may have been) of the name of the Clerk.

And it is urged here that the decision of Mr. Justice Thomas necessarily embodies a finding of fact

that the defendant was not at fault in having been deceived, and that this Court cannot or should not review such determinations.

3. That the notice of appearance and answer of the defendant were served without knowledge of the defect in the summons. That steps taken by the defendant while deceived by the wrong of the plaintiff, did not constitute a *voluntary* appearance.

Counsel urges that for any step in any action to be voluntary under the laws of the United States or the State of New York, a party must proceed with knowledge of the situation either actual or constructive.

It is contended here that the decision of Mr. Justice Thomas in the court below necessarily found as a determination of fact, that the service of these papers was made by the defendant in ignorance of the situation and without any negligent failure on his part to learn the facts.

It is further urged that even if the Court considers this point to be disputed and not determined in the record, still the petitioner is not entitled to a peremptory writ of mandamus if there was sufficient evidence before the Judge upon which the ruling sought to be reversed, might rest.

4. That the State Court practice does not control by virtue of Section 914 of the United States Revised Statutes or otherwise.

5. That under the rules of the Circuit Court for the Eastern District of New York, as well as under the practice of that Court for the past thirty years, it has been the universal requirement that an answer or other appearance to be effective, must be filed. That, therefore, the defendant did not by the service of the notice of appearance or answer, appear in the action, and there was no necessity for an application by him for leave to withdraw an ineffective step toward appearance.

6. That the defendant, learning of the vital defect in the summons when he attempted to file his notice of appearance and answer in accordance with the rule of the Court, and thereupon asking the Clerk of the Court what the effect of his failure to file his appearance would be, and being advised by the Clerk of the Court that it would necessitate the recommencement of suit by the plaintiff and the defendant refusing to file such papers or to take any step in the action, has not since the service of the notice of appearance and answer, appeared in the action. The respondent urges that the service of the notice of appearance and answer having been caused by the wrong of the plaintiff and having learned of the trouble before completing the appearance and thereupon refusing to complete such appearance, cannot be held to have appeared in the action unless the plaintiff can show that after service of the notice of appearance and answer the defendant took some affirmative act inconsistent with a desire to contest the validity of the summons; that an appearance in an action cannot be shown by proof of laches or the failure of a party to take any steps in an action. By this we mean that failure to return a paper served, such as the plaintiff's notice of trial, or failure to advise the plaintiff of her mistake, is not sufficient to constitute a verbal appearance, which can only be made by an affirmative step inconsistent with any other theory.

Nothing that the defendant has done since the service of the notice of appearance or answer was sufficient to constitute an appearance.

The defendant did not return the notice of trial served by the plaintiff, because the service was made in the manner regulated by law, and the notice of trial was in proper form. It could be returned only on one of these grounds. In any event, to hold that there was an appearance by reason of a notice of trial, plaintiff would have to show that the *defendant*

served a notice of trial. There would then be an affirmative act of the defendant inconsistent with the attitude actually assumed and maintained by him. The defendant was under less duty to apprise the plaintiff of her mistake, than the plaintiff to learn of it and correct it herself. In fact, there was no duty whatsoever on the part of the defendant to act as counsel to the plaintiff's attorney, and the defendant's counsel in simply omitting to file the papers, was acting under very good advice, *i. e.*, the Clerk of the Court, in believing that the plaintiff would thereby be obliged to commence a new action.

Counsel further believes that the papers submitted with the respondent's answer show conclusively that the plaintiff's attorney either knew or should have known that the summons was void long before the Statute of Limitations ran against her action.

The respondent's answer shows a notice of appearance or the answer must be filed. The summons must be issued by the Clerk and filed after service (Affidavit of B. Lincoln Benedict, the Clerk, at p. 13).

The affidavit of the Clerk shows that for the past thirty years the rules and practice of the Circuit Court for the Eastern District of New York have required the filing of any appearance to render it valid, and that such rules and regulations have been complied with (p. 13). The rules printed show that the pleadings shall be filed and especially that the appearance must be filed. Rule 8 provides for the entering in the books of the Clerk of the Court of the appearance in an action by the defendant after the filing of the summons with proof of service (p. 13).

The rule further provides that the plaintiff cannot compel the filing of the defendant's answer until after the filing of the declaration or complaint (pp. 13 and 14).

The rule states that, after the filing of the declaration an order may be entered requiring the defendant "to plead thereto within twenty days or

that his default be entered." This clearly shows that the answer must be treated the same as the declaration, which has to be filed.

The rule even speaks of the default on the part of the plaintiff to plead as being entered, showing that the entire record is required in the office of the Clerk.

Rule 35 provides that in order to amend a copy of the amended pleading (either complaint or answer) *shall be filed* and a notice to plead or answer shall be from the day of the service of a copy of the pleading as amended and *on file* (p. 14).

Certainly if an amended pleading must be filed, the original pleading must be.

The summons printed and issued by the Circuit Court reads: "You are hereby summoned to answer the complaint in this action and *to file your answer* and serve a copy thereof," &c. (p. 15).

On the other hand the petitioner claims that Section 914 of the Revised Statutes providing that

> "the practice, pleadings and forms and modes of proceeding in cases in the Circuit Courts shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the Courts of Record of the State, within which such Circuit Courts are held, any rule of the Court to the contrary notwithstanding,"

is controlling and by reason thereof the practice of the State Courts in New York which do not require the filing of the notice of appearance or answer is the practice governing this case. This contention is legally unsound as shown by many decisions referred to later where the point is more elaborately discussed.

The respondent disputes that the State Court practice does not require the filing of a notice of appearance or answer.

Section 824 of the Code of Civil Procedure of the State of New York provides,

> "The summons and each pleading in an "action *must be filed with the Clerk* by "the party in whose behalf it is served, "within ten days after the service thereof. "If the party fails so to file it, the adverse "party on proof of failure, is entitled, with- "out notice, to an order from a Judge that it "be filed within the time specified in the or- "der or be deemed abandoned."

Section 914, U. S. Revised Statutes, is not controlling.

Counsel for the petitioner has overlooked Section 918 of the Revised Statutes of the United States, providing as follows:

> "The several Circuit Courts may from "time to time and in any manner not incon- "sistent with any law of the United States or "with any rule prescribed by the Supreme "Court, make rules and orders directing the "returning of writs and process, the filing of "pleadings, the taking of rules, the entering "and making up of judgments by default and "other matters in vacation, and otherwise "regulate their own practice as may be "necessary or convenient for the advance- "ment of justice and the prevention of delays "in proceedings."

This section immediately follows the section providing for the practice in the Circuit and District Courts in equity and admiralty cases, and therefore applies solely to what the Circuit Courts may do regarding the rules providing for the filing of pleadings *in common law actions.*

As this section has not been repealed, Section 914 must be construed in connection with it. Further than that the Court's attention is directed to the wording of Section 914, which is not as counsel for the petitioner seems to contend, a peremptory direc-

tion that the practice in the United States Circuit Court shall be the same as in the State court, but in the language used shall "conform as near as may be."

The Supreme Court in the case of *Southern Pacific Co.* vs. *Denton, 146 U. S. Supreme Court Reps., page 945*, construed this language in a case having many points in similarity to the one at bar. There the State court statutory provisions made an appearance limited in terms a waiver of lack of jurisdiction of the Court, and this Court held that the State statute regarding what constitutes a notice of appearance and its effect, did not control notwithstanding Section 914 of the Revised Statutes. In other words, a defendant who was beyond the jurisdiction of the Court by reason of his residence, and who had served a limited notice of appearance which under the State statutes was sufficient to give the Court jurisdiction, was held not to have appeared in the action because the law of the United States courts differed from that of the State courts.

The opinion said in part:

> "But the question in this case is not of the validity of those provisions (State statute making service of a limited notice of appearance sufficient to give jurisdiction of the State court over the person of the defendant) as applied in the courts of the State, but whether they can be held applicable to actions in the courts of the United States; this depends on the true construction of Revised Statutes, § 914 (quoting it in full). In one of the earliest cases that arose under this act, the Court said: 'The conformity is required to be "as near as may be"—not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress undoubtedly expected they would do, any subordinate provision in such State statutes which in their judgment would

> unwisely encumber the administration of the law or tend to defeat the ends of justice in their tribunals' (Indianapolis & St. L. R. Co. *v.* Hurst, 93 U. S., 291). * * * And whenever Congress has legislated upon any matter of practice and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the State upon the same matter. * * * Congress cannot have intended that it should be within the power of a State by its statutes to prevent a defendant, sued in a circuit court of the United States in a district in which Congress has said that he shall not be compelled to answer, from obtaining a determination of that matter by that court in the first instance, and by this court on a writ of error. To conform to such statutes of a State would 'unwisely encumber the administration of the law,' as well as 'tend to defeat the ends of justice' in the national tribunals. The necessary conclusion is that the provisions referred to in the practice act of the State of Texas, have no application to actions in the courts of the United States."

In that case the point turned on a provision in the State statute that there was no such thing as a special or limited notice of appearance, while the United States Court practice created without statute or rule of Court, was to the contrary.

In this case the State statute says that appearance shall consist of the service of a notice of appearance or answer, while the rules and practice of the United States Court hold that it must be by the service and filing of notice of appearance or answer. In the present case the United States rule is simply a little broader and more carefully protects the rights of parties than the State court rule, and is not necessarily inconsistent with it, while in the case referred to, So. Pac. Co. *v.* Denton, the United States practice was deemed to wipe out in its entirety a statute of the State court.

Counsel cannot conceive a more parallel case, and it would seem decisive of the issue raised here. It

is the almost universal practice in the courts of this country that an appearance must be entered with the Clerk of the Court, and Section 924 of the New York Code of Civil Procedure provides that the summons and each pleading "must be filed with the Clerk by the party in whose behalf it is served." Where there is any difference, then, the United States Court practice must govern under Section 918 of the Revised Statutes, and the rules, regulations and practice of the United States Court, as shown by the affidavit of Mr. Benedict, the Clerk.

Counsel conceives that this argument answers every point raised by the petitioner, but as a matter of safeguard he desires to refer to the decisions quoted by the petitioner in the brief in support of the petition for the issuance of the rule herein.

POINTS.

I.

The petitioner's first point in that brief was that a voluntary appearance under the State court practice gives jurisdiction though the process is void, and the defendant did not know of the defect. This is diametrically opposite from the law of New York State as it exists to-day.

It is true that at the beginning of the 19th Century some such harsh rule was laid down. As an illustration may be cited the case of *Pixley* vs. *Winchel*, 7 Cowan, 366 (1826), the head-note of which reads "Where a defendant appears though the process is void, and he is ignorant of this fact at the time of appearance, the Court will not afterwards set that or the subsequent proceedings aside."

This case with many others cited by the petitioner, were decided before the sections of the Code under which the petitioner claims, were enacted and have not been the law of this State for twenty years or more.

The only recent cases cited in support of the petitioner's first contention were *In re Johnson*, 167 U. S., 124, which counsel cannot see relates to any point involved, and *Barnes* vs. *Western Union Telegraph Company*, 120 Fed. Rep., 555, which counsel conceives to be a decision favorable to the respondent. A part of the opinion is as follows:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity. * * * He is not considered as abandoning his objection because he does not submit to further proceedings without constestation. It is only where he pleads to the merits in the first instance without insisting upon the illegality that the objection is deemed to be waived."

The essence of this decision is that a defendant, knowing of a defect in the proceedings, must raise only that issue and not go into the merits; otherwise he will have waived the defects in the jurisdiction.

So here, if the defendant knew of the void summons, he could not appear in the action and plead to the merits without being held to waive the defect.

The cases counsel will refer to later, show conclusively that a party learning for the first time of a defect in the process, is not estopped by what he had already done in an action, but can withdraw his appearance. Hence *a priori*, if he has not fully appeared he cannot be forced to complete his appearance.

In the case of *Farmers and Merchants' St. Bank* v. *Stringer*, *75 App. Div.*, *127*, a summons without the endorsement as to the nature of the suit required by Section 1897 of the Code of Civil Procedure, was served upon the defendant, who in ignorance of the fact that suit was brought to recover a penalty, caused a notice of appearance to be served.

The service of the notice of appearance was sufficient under the State court practice to constitute an appearance in the action, and upon showing that he had been deceived by the summons served, he was allowed to withdraw a complete appearance made by him.

See also

Lassen v. *Aronson*, 21 N. Y. Supp., 452,

And *United States* v. *Riley*, 88 Fed. Rep., 480,

where a defendant was not allowed to withdraw a complete appearance simply because the Court held that when he so appeared in the action he knew of the defect in the summons.

II.

The petitioner's second point was that if the appearance was sufficient in New York, it was sufficient in the United States court, there being no statute or rule to the contrary.

It has already been argued at length that the United States practice and rules and statutes are to the contrary, and shown that the practice in the State court does not govern.

Under this point the petitioner refers to the cases of *Reed* v. *Chilson et al.*, 142 N. Y., 155; *Bissell* v. *N. Y. Central & H. R. R. R. Co.*, 67 Barb., 385; *Crown Cotton Mills* v. *Turner*, 82 Fed. Rep., 387; *Delisser* v. *N. Y. & New Haven R. R.* 59, Superior, 233; *Farmers' Bank* v. *Stringer*, 75 App. Div., 129.

In the Reed *vs.* Chilson case it was held that a party having full knowledge of the facts, serving a general appearance and answering to the merits, waived any right to object to the jurisdiction of the Court. This was all that the Court held in the

Reed *vs.* Chilson case, as shown by the decision of Wood *vs.* Furtick, 17 Misc., 564, where Mr. Justice Bischoff in writing his opinion, refers explicitly to the ruling in the Reed case.

Counsel admits that the decision of Bissell *vs.* N.Y. Central & Hudson River R. R. Co. (1872) is against the respondent. That case holds that a notice of appearance served in ignorance of a defect in the summons, cures that defect. The only difficulty with the decision which counsel can find, is that it has been overruled many times as in United States *v.* Riley, 88 Fed. Rep., 482, and particularly in the case of Farmers' Bank *v.* Stringer, 75 App. Div., 127 (1902), where the exact opposite of the doctrine was held to be the present law of New York State.

The Crown Cotton Mills vs. *Turner*, cited as support for the petitioner's position, is believed by the respondent to favor him. The head note reads:

> "The filing of a general appearance in a federal Court in an action commenced by service of summons alone is no waiver of defendant's right to move to dismiss for want of jurisdiction, when, on the subsequent service of the complaint, it for the first time appears that the only ground of federal jurisdiction is diverse citizenship and that the action is brought in the wrong district."

The decision is by Mr. Justice Lacombe in an action in the Circuit Court for the Southern District of New York, and seems to counsel to be authority for the following propositions:

1. The appearance is filed in the United States Circuit Court for the Southern District of New York, instead of not being filed as claimed by the petitioner on page 11 of the petition.

2. That a deception of a defendant by the act of the plaintiff does not deprive the defendant of his relief, nor make the service binding.

3. That after the completion of the appearance (by filing) the defendant must move for relief, and hence, by implication, if appearance has not been fully made he can simply rest on the failure of the plaintiff to bring him into court.

Mr. Justice Lacombe in writing the opinion, says:

> "There seems to be manifest unfairness in holding that defendant has waived rights of which he was not advised, when his ignorance is the necessary consequence of plaintiff's own act."

Counsel urges the forceful language of Judge Lacombe as a protest against the position taken by the petitioner that the result of her own wrong shall inure to her benefit.

If the petitioner's position is correct, then willful fraud, deliberate forgery, or other wrong bringing a party into court, is equally effective with the lawful service of proper court process.

There is an amusing case reported in the 13th Hun (New York State), page 157, where a man, who, after giving some spiritual seances, attempted to get a license. He went to the City Clerk, and was told by the Clerk that if he was in a hurry, to go with him to the magistrate. The Clerk told the Justice, "This is the man that held spiritual circles," and the plaintiff volunteered, "Yes, I am the man." The Justice then asked whether he had taken money at the door, and he replied that he had taken a collection from the audience, whereupon the Police Justice said to the plaintiff, "You have violated one of the penal ordinances of the city, and I fine you fifty dollars or ninety days in the county jail," and turned him over to the Chief of Police—presumably to recover from his astonishment at the speed with which rural justice moved.

In an action to recover back the amount paid by him in satisfaction of that judgment, the Appellate

Court somewhat naturally held that his appearance had not been a voluntary appearance (Merkee *v.* City of Rochester, 13 Hun, 157).

So here the defendant was tricked into a partial appearance, but no court will ratify and enforce that trickery, even though it may have been unintentional.

Of the other two cases cited by the petitioner, the case of Delisser *vs.* N. Y. & New Haven R. R. Co. is in no way in point, and the case of Farmers' Bank *vs.* Stringer reverses the Bissell case relied on by the petitioner.

III.

The petitioner urges that the defendant by appearing in court to oppose the application made by her, and especially in urging laches, thereby appeared in the action.

The absurdity of this contention appears on its face. The only way, says the petitioner, that the defendant could keep from submitting to the jurisdiction of the Court was to let the motion to compel him to submit to the jurisdiction, be granted by default; that if he opposed the motion, then the object of the motion was accomplished. She should have labeled her papers: "Motion to compel the defendant to oppose this motion."

As said in *Barnes* vs. *Western Union Telegraph Company, 120 Fed. Rep., 555*, "He is not considered as abandoning his objection, because he does not submit to further proceedings without contestation." As to the defendant raising the point of laches, that would only aid the plaintiff, had the defendant urged laches as an answer to the plaintiff's suit for damages. Then he might well be held to have answered to the merits of the action. This he has never done.

The laches urged is laches tending to defeat the motion to compel the filing of the answer, and has

no relation or reference to the action for damages. If the defendant can oppose the motion to compel the filing of the answer, he can oppose it on every conceivable ground.

In support of this point the plaintiff cites *Farmer* vs. *National Life Ass'n of Hartford, 138 N. Y., 265*, which case counsel conceives does not assist her. On the contrary that case held that the rule as to what did not constitute an appearance in an action in the United States courts, need not be followed in the State courts. The Court of Appeals in that case laid down a specific rule diametrically opposite to the decisions of the United States court regarding what constitutes an appearance in an action. This case is therefore one more bit of evidence showing that what constitutes an appearance according to the State courts and the United States Courts holding in New York State, are not and will not be the same.

The basis of the Farmer decision was simply that a party who in an action commenced against him, makes a motion which is necessarily based on the fact of a proper action commenced is thereby estopped from denying the institution of that suit. In this case the defendant has never made any motion or asked for any relief in the action, but has confined his efforts to opposing applications by the petitioner.

In referring to the Farmer case, Mr. Justice Bischoff in Wood *vs.* Furtick, *supra*, said, "In the Farmer case the decision was not predicated of the fact of a general appearance by the defendant, but it was ruled that the defendant was estopped from denying that it had generally appeared and submitted to the jurisdiction of the Court because it had applied for and availed itself of relief to which it was entitled only after a general appearance in the action" (17 Misc., 564).

The case of *Payne* vs. *Galbraith, 38 App. Div., 68*, referred to by the petitioner, holds that the ob-

taining of a stipulation of time to answer by an attorney signing himself "Attorney for defendant," does not constitute an appearance but would probably estop him from denying jurisdiction as he could get such stipulation only after an appearance. In this case the defendant tried to get a stipulation while in ignorance of the defect in the summons, but was refused by an attorney who attempted to take his default and no extension was ever obtained to answer by him.

The adjournment of the motion to compel the filing of the answer could undoubtedly be done by the defendant if the defendant could oppose the motion at all.

As the vital point before the Court here is whether the appearance according to the State court practice is binding in the United States court, counsel desires to again refer to the matter.

He has already cited the Court of Appeals of the State of New York, showing that the New York State courts will not be governed by the decisions of the United States courts in New York defining an appearance.

Reference is now made to the United States courts. In the case of *Louden Machinery Co.* vs. *American Mal. Iron Co., 127 Fed. Rep., 1008 (Feb. 1904)*, the District Court of Iowa held that the United States District Court would not be bound by a State statute defining a notice of appearnce.

The Court said:

> "And Judge Shiras held in Elgin Canning Co. *v.* Atchison R. R., 24 Fed Rep., 866, 'that when the defendant filed a plea in the State court, that it was not amenable to suit and at the same time filed its petition for removal, the invalidity of the service was not waived. But in all such cases the question is not what the State court would hold but the question is what should this court hold which does allow special appearances. * * * In my opinion the State court did not acquire

> jurisdiction over the defendant and that defendant has not surrendered itself to the jurisdiction of either the State court or of this court. And it is for this court and this court alone to pass on those matters.'" (p. 1010).

In the case of *Goldie* vs. *The Morning News, 155 U. S., 518*, a part of the head note is as follows:

> "In a personal action brought in the State court against a corporation which neither is incorporated nor does business within the State, nor has any agent or property therein, service of a summons upon its president temporarily within the jurisdiction although good in the State courts, will not be held sufficient service upon the corporation in the United States Circuit Court, a court of a different government, although sitting in the same State."

The opinion in this case was written by Mr. Justice Gray in a case brought in the Supreme Court, Kings County (Brooklyn, New York City), and removed to the Circuit Court for the Eastern District of New York (the same court as this action was supposed to be pending in). The Court there ruled contrary to the Court of Appeals of the State of New York in two important points:

1. It held service made properly according to the State statute while it did not controvert any United States statute was still against the principle of the United States decisions, and would not be held binding in spite of 914 of the Revised Statutes, and 2. It held contrary to the decision of the Court of Appeals of the State of New York that an application to remove the action to the United States Court did not constitute an appearance.

In Barrow *vs.* Kane, 170 U. S., 110, Mr. Justice Gray, in writing the opinion, said:

> "But the jurisdiction of the Circuit Courts of the United States is not created by and

does not depend upon the statutes of the several States."

In *Cady* vs. *The Associated Colonies, 119 Fed. Rep., 420 (1902)*, part of the head note is as follows:

> "The authority of a Federal court into which a cause has been removed, to determine whether the State court by the service made acquired jurisdiction over the defendant, a foreign corporation, to render judgment against it, is neither derived from nor limited by the laws of the State; nor is such court concluded by the decision of the State court thereon."

From all these decisions, it would appear that if the State court had actually ruled in this case that what the defendant had done constituted an appearance, it would have no binding force and effect on the United States Circuit Court, and that the counsel for the petitioner has completely overlooked or misapprehended the force and effect of Section 914 of the United States Revised Statutes.

In this case Judge Thomas held that the defendant was forced into court by forgery of a United States document; that his appearance has never been completed; that he has never waived the defect and presumably that the attorneys for the plaintiff and petitioner were guilty of gross laches in failing to discover their mistake, and that they were advised by the Court itself through its Clerk at the time that the summons was all wrong.

Counsel desires to refer to but one more point, and that is that every application made by the petitioner has been an attempt to compel the filing of the defendant's answer.

While success in forcing the filing of the notice of appearance would have been claimed effective, still the attempt to get the answer on file shows conclusively that the petitioner recognized and always has recognized that the filing of the answer

or the notice of appearance is required by the United States Circuit Court.

In this very application before the Supreme Court she asks that the order denying the motion to compel the filing of the answer be stricken from the records, and that she be given the relief to which she is entitled.

Counsel does not know what will be contained in the affidavits to be filed in reply, but begs to refer to the papers which were before Judge Thomas in the court below and which are now with the Clerk of the United States Supreme Court.

Respondent submits that the petition for a writ of mandamus should be denied and the application dismissed.

Respectfully submitted,

ALVIN CUSHING CASS,
Counsel for Respondent.